NO. 83-334

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al.,
*Appellants,*

v.

LEILA G. BROWN, et al.,
*Plaintiffs-Appellees,*
UNITED STATES OF AMERICA,
*Intervenor-Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## MOTION TO AFFIRM OR DISMISS

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## QUESTIONS PRESENTED

1. Are the District Court's findings, affirmed by the Court of Appeals, that the at-large election system was adopted and has been maintained for racially invidious motives clearly erroneous?

2. Should the judgment below be affirmed on the alternative ground, not reached by the Court of Appeals, that the District Court's rulings establish a violation of the amended Section 2 of the Voting Rights Act, based on the law of the case as well as the District Court's most recent findings of fact?

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## MOTION TO AFFIRM OR DISMISS

Plaintiffs-Appellees Leila G. Brown, et al., on behalf of all black citizens of Mobile County, move the Court to affirm the judgment of the Court of Appeals or to dismiss, for the reasons set out below.

### I. The Fourteenth Amendment Violation, Based on Findings by Two Courts Below, of Invidious Intent Should be Affirmed as Not Clearly Erroneous

This is the same case previously reviewed by this Court in *Williams v. Brown*, 446 U.S. 236 (1980), the companion case with *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In the prior decision, the Court vacated the first judgment striking down at-large school board elections in Mobile County and remanded the case for reconsideration in light of the intent standard set out in *Bolden*. Following remand, the District Court took new evidence and entered findings of fact that the election scheme was adopted for a racial purpose in 1876 and that racially motivated actions of the incumbent school commissioners had successfully thwarted the attempts of black legislators to change to a single-member district system in the 1970's. *Brown v. Board of School Comm'rs of Mobile County*, 542 F.Supp. 1078 (S.D. Ala. 1982). The Court of Appeals affirmed, 706 F.2d 1103 (1983), and the white school commissioners[1] have taken a direct appeal to this Court under 28 U.S.C. §1254(2).[2]

[1]Two black commissioners were elected from single-member districts in 1978, pursuant to the District Court's remedial order, but the District Court enjoined both of them from participating in the school board's subsequent decisions to prosecute appeals. Final Judgment and Injunction, May 12, 1982, at 3.

[2]The District Court, the Court of Appeals, and this Court all denied stays of election sought by Appellants pending this appeal. *Brown v. Board of School Comm'rs*, No. 75-298-P (S.D. Ala., Aug. 3, 1983); *Brown v. Board of School Comm'rs*, No. 83-7459 (11th Cir., Aug. 30, 1983);

Above all, this appeal does not warrant plenary review. In *Rogers v. Lodge*, 102 S.Ct. 3272 (1982), the Court at the same time demanded proof of purposeful discrimination in constitutional challenges to at-large election systems and established Rule 52's clearly erroneous standard as the yardstick for appellate review of this "pure question of fact". 102 S.Ct. at 3276, 3278. In the instant case, the District Court has conducted two lengthy trials, and, based on the extensive evidence, both it and the Court of Appeals are satisfied that invidious purpose has been proved as a matter of fact. Now, in this Court, Appellants make no suggestion that the lower courts have applied the wrong legal or constitutional standard or have committed any other error of law. Their appeal is based entirely on strained contentions that the evidence does not support the findings of fact. They ask this Court to upset both the ultimate and subsidiary findings of fact made by the trial judge. J.S. 7. They depend on arguments that the eighteen-year record in the Mobile County school desegregation case are "farfetched materials" irrelevant to issues of responsiveness, and that the unrebutted in-court testimony of the expert witnesses was not believable. J.S. 6, 15. They attempt to characterize the evidence in ways that unfortunately display the disingenuous attitudes that have long marked the defense of White Supremacy: a claim that the blatantly racial controversies of the Reconstruction Period in Alabama should be viewed only as partisan issues between Democrats and Republicans, J.S. 11;[3] and an astounding refusal

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*Board of School Comm'rs v. Brown*, No. 83-334 (A-182) (Sept. 16, 1983) (J. Powell); *aff'd* 52 U.S.L.W. 3261 (Oct. 3, 1983). When the winners of the two school board seats to be decided in the November 8, 1983, general election have been certified, all five members of the board will have been elected from single-member districts.

[3]All three historians who testified at the remand trial agreed that racial issues had primacy over partisan issues during Reconstruction, a view that

to recognize that blacks in Mobile County today have less formal education and lower socio-economic status than does the white population, J.S. 15.[4]

Rule 52 requires that appellate courts defer to the findings of fact made by the trial court, unless they are left with a definite and firm conviction that a mistake has been committed. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S.Ct. 2182, 2189 (1982). Under the clearly erroneous rule, this Court will not decide factual issues *de novo*. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). It will give due regard to the trial judge's opportunity to assess the credibility of witnesses, *id.* at 122 n.18, and it will not ask the question whether it would have made the same findings the trial court did, *id.* at 123. The same deference will be extended to the District Court's findings even where Congress has afforded a direct appeal to this Court. *United States v. Oregon State Medical Society*, 326 U.S. 326, 332 (1952).[5] Unless the Court means to review literally every vote dilution case in plenary fashion, the instant appeal should be rejected summarily.

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generally is undisputed among Southern historians. Tr. 67-70, 149-50, 235.

[4]According to 1980 federal census data for Mobile County, 52.8% of all black persons over 25 years old have not completed high school, while only 32.9% of whites over 25 years have not. U.S. Department of Commerce, Bureau of the Census, 1980 Census of Population and Housing, Mobile, Alabama, SMSA, PHC80-2-245, pp. P-86, P-96, (1983). The median and mean incomes of black families in 1979 were $9,333 and $12,498 respectively; for white families they were $18,003 and $20,393. *Id.* at P-91, P-103. 35.2% of all black families had incomes below the poverty level, as compared with 7.6% of all white families. *Id.*

[5]Most actions challenging racially discriminatory local election structures will call into question the constitutionality or lawfulness of some local law or ordinance and thus will be eligible for direct appeal to this Court under 28 U.S.C. §1254(2).

A. *The Finding That the Current At-large Scheme Was Adopted in 1876 for a Racially Discriminatory Purpose Is Not Clearly Erroneous.*

The District Court's findings of fact concerning the adoption of Mobile County's school board election system are lengthy, detailed and annotated with record citations. J.S. 7b-22b.

The District Court found that the present at-large school board system can be traced back to an 1876 law that was racially motivated. J.S. 21b, 53b. The preceding election system, adopted as a compromise between Radical Republicans and Conservative Democrats, had a limited vote provision that was designed to ensure at least some representation for the black minority. J.S. 18b. Appellants argue that this finding was based entirely on a newspaper article. J.S. 10. Actually, the District Court relied on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and based its finding of intent on "crystal clear" adverse racial impact of the 1876 change, J.S. 53b, the sequence of events leading to the change, J.S. 21b, the racial purposes expressed in contemporaneous statements of the 1876 "Redeemer" state legislature, J.S. 20b, 53b, and the unequivocal, unrebutted opinions of two respected historians, J.S. 21b, 53b. The historians also were swayed by the sequence or pattern of events, particularly when they are viewed, as scholars do, in the overall context of the times. Tr. 148, 151-52, 160, 200-01. In reaching his opinion, Dr. Peyton McCrary of the University of South Alabama researched and considered — in addition to newspapers — statutes, records of legislative proceedings, official reports of state government agencies, minutes of school board meetings, extensive secondary literature on the period and the available private correspondence of some of

the principals.[6] Tr. 90, 92; Pl. Exs. 3-12, Gov. Exs. 19-27, 57-101, 106-07, 115, 118-30.

Both courts below rejected the Appellants' contention, advanced again here, J.S. 8, that the proper view of the legislative history is either that the present at-large system was adopted (for purposes of deciding intent) by the 1919 statute or that it was adopted in 1826 and has never essentially changed. J.S. 5a, 7a, 21b-22b. This action was not merely a challenge to the at-large voting aspect of the election system; the election scheme must be viewed as a whole when considering whether or not it is intended to exclude blacks' choices. *E.g., Rogers v. Lodge, supra,* 102 S.Ct. at 3280-81.[7] The only critical changes that occurred in the history of Mobile School Board elections, so far as blacks are concerned, were those in 1867 to 1876. During that period, election methods were used that assured minority input, first by Republican controlled appointments and then by the limited vote provision of the 1870 law. So far as blacks are concerned, the election history of Mobile began in 1870, which was the first local election in which blacks were eligible to vote. Once the limited vote provision was removed in 1876, the chances of blacks being elected were eliminated. The reduction from nine to five commissioners in 1919 had little or no effect on the racially exclusionary features of the system.[8]

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[6]Extensive primary research was conducted in preparation for the trial on remand. Dr. McCrary invested some 75 to 100 hours preparing for the case himself, and his research assistants spent two to three times as many hours. Tr. 90, 137-38.

[7]In fact, the various proportional representation election schemes, such as the single-transferrable vote method, require the use of at-large districting; they will not work in single-member districts. *E.g.*, Still, "Political Equality and Election Systems," 91 *Ethics* 375, 385 (1981); Rogowski, "Representation in Political Theory and in the Law," *id.* at 411.

[8]The requirement that a few of the school commissioners live in the rural parts of Mobile County was also eliminated in 1919. But since the

B. *The Findings That the At-Large System Has Been Maintained for a Racially Discriminatory Purpose Are Not Clearly Erroneous.*

The District Court found a racial purpose behind the maintenance of the at-large system since 1876, using both the *Arlington Heights* and *Rogers v. Lodge* analytical approaches. J.S. 34b-41b, 51b-53b, 54b-57b.

The *Arlington Heights* analysis centered on the Kennedy and Sonnier Bills in 1975 and 1976 and the 1978 internal board policy changes that were designed to dilute the voting strength of the new black board members. J.S. 34b-41b. Based on the sequence of events and the trial testimony of legislators and school commissioners, the District Court determined that the incumbent white commissioners had dissembled with both the legislative delegation and with the court, were guilty of unclean hands, and had acted with "the specific intent to maintain the at-large system . . . for the purpose of denying blacks a voice in the operation of the county's school system." J.S. 38b. This conclusion was based, among other things, on the subsidiary finding that the incumbent school commissioners significantly influenced and defeated the legislative efforts to change to single-member districts. J.S. 41b. But for the racially motivated machinations of the Appellants, the political achievement of the black representative, Cain Kennedy, in 1975 would have mooted the issues in this lawsuit permanently. J.S. 34b. This critical finding was based on the local district judge's careful assessment of the local realities that control the outcomes of local legislative initiatives. It is the kind of "sensitive inquiry" that this Court will give special deference to on appeal. *Arlington Heights, supra,* 429 U.S. at 266.

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old residency requirement did not operate on subdistricts, it could have had little consequence for black political participation anyway.

The District Court made an alternative holding of maintenance intent, "without regard to the explicit reconsideration of the at-large plan in 1975 and 1976," J.S. 55b, by using the *White v. Regester,* 412 U.S. 755 (1973), approach. Applying the teaching of *Lodge v. Buxton,* 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom Rogers v. Lodge,* 102 S.Ct. 3272 (1982), the District Court readopted its 1976 findings of fact. J.S. 33b, 55b. *Rogers* upheld findings of invidious intent based on evidence that racial bloc voting had prevented black candidates from being elected in an at-large system, at least where such "important evidence of purposeful exclusion" was supported by the evidentiary factors "suggested in *Zimmer v. McKeithen,* [485 F.2d 1297 (5th Cir. 1973) *(en banc)*, *aff'd sub nom, East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976)]." 102 S.Ct. at 3279. In the instant case, the District Court relied on precisely the same evidence to reach its conclusions: no candidates openly supported by blacks have ever succeeded in countywide elections, because of severe racially polarized voting, and all of the primary and enhancing *Zimmer* factors are present to support the inference of purposeful discrimination. J.S. 54b-56b.

Appellants again challenge here the findings of both courts below that white school commissioners elected at large have been unresponsive to the interests of black citizens. J.S. 13-14, 9a, 33b. The unresponsiveness findings are supported by the evidence and are not clearly erroneous. Moreover, this Court has already decided the legal question Appellants are attempting to revive: proof of unresponsiveness is not an essential element of a fourteenth amendment violation. *Rogers v. Lodge, supra,* 102 S.Ct. at 3280 n.9.

C. *Appellants Failed at Trial to Carry Their Burden of Proving That the Continuing Effects of the Discriminatory Election System Have Been Eliminated.*

Once it was established that the election system was created or had been maintained in violation of the Voting Rights Act and the Constitution, the burden shifted to the state to prove that all vestiges of its racial policies have been eliminated. *City of Richmond v. United States*, 422 U.S. 358, 373-79 (1975); *Kirksey v. Board of Sup'rs of Hinds County*, 554 F.2d 138, 144 (5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968 (1977). Appellants failed to meet this burden of proof. The Court of Appeals affirmed the District Court's finding that present adverse racial effects of the purposeful discrimination still exist. J.S. 8a-9a. There is no likelihood that this Court will disturb these findings under the clearly erroneous standard.

The Appellants' contention, J.S. 14-18, that things have changed since the District Court's 1976 opinion is based on the 1980 election of a black candidate in each of two small Mobile County municipalities and on the opinions of a few white politicians that a "qualified" black candidate could now win in a countywide election. The District Court properly credited the expert testimony that Citronelle and Bayou La Batre were too small in relation to the size of the whole county[9] to outweigh recent examples of how white bloc voting will defeat black candidates running countywide. Tr. 234-35. And the District Court properly rejected the self-interested testimony of Appellants' political cronies.[10]

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[9]According to the 1980 census, Citronelle had a total population of 2841 and was 20% black, and Bayou La Batre had a total population of 1999, which was 9.6% black. Mobile County, by contrast, has 364,379 people, 31.5% black.

[10]The district judge explained: "Hard data interpreted with an eye towards consistency, as had been offered here, speaks more forthrightly

## II. The Judgment Should be Affirmed Under the Amended Voting Rights Act

The Court of Appeals declined to reach the statutory issue, based on the District Court's ruling that the school board election system violates (unamended) Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973. J.S. 7a n.5, 57b. However, in this appeal, it affords an alternative ground for affirmance. Even though this Court's mandate directed reconsideration of the constitutional issues framed by *City of Mobile v. Bolden,* the Voting Rights Amendments of 1982, Pub. L. No. 97-205 (June 29, 1982), are fully applicable to pending actions. *United States v. Johnson,* 102 S.Ct. 2579 (1982); *Hutto v. Finney,* 437 U.S. 678, 694-95 (1978); *Bradley v. Richmond School Bd.,* 416 U.S. 696 (1976).

The amended Section 2 provides:

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than statements by politicians, which may be subject to complex and various interpretations." J.S. 32b n. 15. Former State Senator John Tyson acknowledged that he was a close political friend of School Board president Dan Alexander, Tr. 462. On cross examination, Tyson admitted that the black man recently elected in Bayou La Batre had previously been appointed to the city's Water and Sewer Board by the City Council and was a well-known volunteer fireman in a city that had only 29 or 30 black voters. Tr. 446, 450. Tyson also admitted that the black man elected in Citronelle had swept into office as part of an anti-incumbent ticket, supported by a concerned citizens group who was upset about federal charges of corruption among the city incumbents. Tr. 452-55. Former State Senator Mike Perloff is the white politician referred to in the district court's 1976 opinion as having narrowly beaten a black candidate in 1972 with the use of racial campaign tactics. 428 F.Supp at 1128. He was defeated in 1976 by another black candidate in a racially changing district that by 1980 was 69% black. State Senator Callahan and State Representative Sandusky were among the local legislators who consistently voted against blacks' proposed changes to single-member districts. D.Ex. 5, 6. Former County Commissioner Bay Haas was an original defendant in this action. And Dan Alexander, who attempted to change his earlier opinion that blacks could not be elected county-wide, is the defendant School Board president whose testimony the district court has found to be untrustworthy.

> A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open for participation by members of the class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Pub. L. No. 97-205, §3. These were precisely the findings of fact made by the District Court in its 1976 opinion, affirmed by it on remand. Following the principles of *White v. Regester,* 412 U.S. 755 (1973), the district judge sought to determine "whether the processes 'leading to nomination and election [are] . . . equally open to participation by the group in question,' " 428 F.Supp. at 1127. After "[a]ttentive consideration" of the totality of the circumstances, the court found that the at-large school board election system "violates the constitutional rights of the plaintiffs by improperly restricting their access to the political process." *Id.* at 1140. It is no coincidence that the amendment to Section 2 is identical to the trial court's findings in the instant case. This was the companion case to *City of Mobile v. Bolden,* based largely on the same facts. The congressional purpose of the amended Section 2 is to restore the legal standards which applied to vote dilution cases prior to *Bolden* and to codify the pre-*Bolden* caselaw. S. Rep. No. 97-417, 97th Cong., 2d Sess. at 2. Specifically, Congress intended to restore the analytical framework of *White v. Regester. Id.* at 28 n.113. Most of the typical evidentiary factors set out in the Senate Report were found to be present by the District Court in the instant case. *Compare* S. Rep., *supra,* at 28-29 with 428 F.Supp. at 1126-32.

It might fairly be said that, as a companion case to

*Bolden, Brown* was one of the specific cases that Congress intended to reaffirm.

## CONCLUSION

For the aforegoing reasons, the appeal should be affirmed or dismissed.

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